Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NO 289 OF 1988
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
14 JULY 1989

Civil Procedure - Summary judgment - Claim on deed relinquishing legal claims for monetary consideration and a letter of guarantee to enforce terms of deed - Application for summary judgment dismissed - Approach to be taken by appellate court on an O 14 appeal - Where all issues are clear and matter of substance can be decided once and for all court should deal with matter in O 14 application - Court should not go behind written terms of contract to introduce or add new terms to it - Proper case for summary judgment - Rules of the High Court 1980, O 14

Evidence - Written contracts which are clear and unambiguous - Construction - Extrinsic evidence not admissible - Evidence Act, ss 91 & 92

In this case the appellant's claim was grounded on a deed between the appellant and the first and second respondents and an agreement in writing executed by the third, fourth and fifth respondents being directors of the first and second respondent companies. In the deed it was stated that in consideration of the appellant agreeing, inter alia, to forbear from further prosecuting certain civil actions and to discontinue the same, the first and second respondents jointly and severally agreed to pay to the appellant the sum of $3m. In the agreement it was stated that the third, fourth and fifth respondents jointly and severally guaranteed the observance and performance of the terms and conditions of the deed. The appellant pursuant to the agreement did forbear to prosecute the civil actions and had discontinued it. After the said instruments were executed the third respondent gave to the appellant a cash cheque for $50,000 and another cheque for $200,000. The cash cheque was honoured but the other cheque was not. Subsequently, the appellant gave notice to all the respondents demanding the balance sum of $2,950,000. In their statement of defence the third, fourth and fifth respondents denied that they were unqualified guarantors and averred that the appellant had fraudulently misrepresented the actual amount spent on the timber concession which was the subject matter of the civil actions which had been discontinued. The learned judge in the High Court held that this was an arguable case and the respondents had raised triable issues in their defence and accordingly dismissed the application for summary judgment. The appellant appealed.

Held, allowing the appeal:

(1) The approach to be taken by an appellate court in an O 14 appeal has been settled. The appeal court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing.

(2) There has been a long line of authorities for the proposition that where all issues are clear and the matter of substance can be decided once and for all without going to trial, there is no reason why the court hearing the application for summary judgment should not deal with the whole matter under the procedure in an O 14 application.

(3) It is clear that the action by the appellant was to enforce the terms of the deed and the letter of guarantee. It was a claim based on the respondent's contractual obligations arising from the deed and the letter of guarantee which are couched in words which are clear and unambiguous. Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it.

(4) The respondents did not challenge the validity of the contract on the ground of fraud or want or failure of consideration. What they sought to do was to attempt to establish that when the demand for payment was made to them the appellant had made some fraudulent misrepresentation. In a situation like this the duty of the court is confined to the construction of the written documents and the extrinsic evidence is not admissible by virtue of ss 91 and 92 of the Evidence Act;

(5) This was a proper case for summary judgment and the appeal should be allowed.

Cases referred to

1 *Malayan Insurance (M) Sdn Bhd* v *Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (folld)
2 *National Company for Foreign Trade* v *Kaya Raya Sdn Bhd* [1984] 2 MLJ 300 (refd)
3 *European Asian Bank* v *Punjab and Sind Bank* [1983] 2 All ER 508; [1983] 1 WLR 642 (refd)
4 *Citibank NA* v *Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (folld)
5 *Tindok Besar Estate Sdn Bhd* v *Tinjar Co* [1979] 2 MLJ 229 (folld)

Legislation referred to

Evidence Act ss 91, 92
Rules of the High Court 1980 O 14

Mahinder Singh Dulku (*Lim Kean Siew* and *Ooi Chooi Lee* (*Ms*) with him) for the appellant.
Dominic Puthucheary for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The appellant as plaintiff went before the learned judge of the High Court on an application under O 14 of the Rules of the High Court 1980 for summary judgment for the amount endorsed in the writ, to wit $2,950,000 and interest at the rate of 14% pa on the sum claimed until judgment and thereafter at the rate of 8% pa until satisfaction.

The appellant's claim was grounded on a deed dated 3 April 1985 between the appellant and the first and second respondent companies and an agreement in writing also dated 3 April 1985 executed by the third, fourth and fifth respondents being directors of the first and second respondent companies. In the deed it is stated that in consideration of the appellant agreeing, inter alia, to forbear from further prosecuting certain civil actions and to discontinue the same, the first and second respondent companies jointly and severally agreed to pay to the appellant the sum of $3,000,000. In the agreement it is stated that the third, fourth and fifth respondents jointly and severally guaranteed the observance and performance of the terms and conditions of the deed referred to earlier.

It is not disputed that the appellant pursuant to the agreement did forbear further to prosecute the said civil

actions and in fact on 15 April 1985 discontinued the same.

After executing the said instruments the third respondent gave to the appellant a cash cheque for $50,000 and another cheque for $200,000 with a request to the appellant that the latter should not present the second cheque for payment until 29 April 1985. The appellant agreed to the request. The cash cheque for $50,000 was honoured but the second cheque for $200,000 was returned dishonoured when presented for payment on the agreed date. Subsequently on 22 July 1985 the appellant through his solicitors gave notice to all the respondents and demanded the balance sum of $2,950,000.

In their statement of defence the third, fourth and fifth respondents denied they were unqualified guarantors and averred that the guarantee given was subject to a full and honest disclosure of the audited accounts expended by the appellant and that they had declined to pay the balance after having discovered that the appellant had fraudulently misrepresented on the actual amount expended on the timber concession which was the subject matter of the civil actions referred to earlier.

The learned judge in the High Court held that this was an arguable case and the respondents had raised triable issues in their defence and accordingly dismissed the application for summary judgment.

The approach to be taken by an appellate court in an O 14 appeal has been settled. The appeal court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing. This principle was reiterated in *Malayan Insurance (M) Sdn Bhd* v *Asia Hotel Sdn Bhd*[1] which referred to *National Company for Foreign Trade* v *Kayu Raya Sdn Bhd*[2] following *European Asian Bank* v *Punjab and Sind Bank*[3] at p 516.

There has been a long line of authorities for the proposition that where all issues are clear and the matter of substance can be decided once and for all without going to trial, there is no reason why the court hearing the application for summary judgment should not deal with the whole matter under the procedure in an O 14 application. See also *Citibank NA* v *Ooi Boon Leong & Ors*.[4] In *Malayan Insurance (M) Sdn Bhd*,[1] I had occasion to refer to the underlying philosophy in the O 14 provision. It is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim.

In the instant case it should be observed at once that the claim is based on two written instruments. The deed appears at pp 116-119 of the record of appeal and the letter of guarantee of the same deed appears at pp 120-124 of the appeal record. Clause 1 of the deed states as follows:

> 1 In consideration of the sum of Ringgit Three Million ($3,000,000) to be paid by the employers to the contractor in the manner provided in cl 2 hereof each of the parties hereto hereby releases the other of them from all sums of money actions proceedings accounts claims and demands whatsoever which each of them now has or at any time theretofore had against the other for or on account of or in relation to any act cause matter or thing whatsoever down to and inclusive of the date of this deed.

The preamble to the agreement states as follows:

> (2) It is a term of the said agreement that OKS and OTP have agreed to pay you a sum of Ringgit Three Million only ($3,000,000) as full and final settlement of the said civil suits *in the manner and at the times as provided in the said agreement*. (Emphasis provided).
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> (3) For the consideration herein provided we have agreed jointly and severally to give this guarantee in your favour upon the terms hereinafter appearing.

Simply stated these written contracts are respectively a deed relinquishing legal claims for monetary consideration ($3,000,000) and a letter of guarantee to enforce the terms of the deed. It is to be observed that they are complete and self-contained documents.

The respondents had given the appellant a cheque for $50,000 pursuant to cl 2(a) of the deed and also a cheque for $200,000 in part payment of the balance sum of $2,950,000 which cheque was subsequently dishonoured. The third respondent also gave post-dated cheques for the rest of the amount.

It is clear that the action by the appellant was to enforce the terms of the deed and the letter of guarantee. It was a claim based upon the respondents' contractual obligations arising from the deed and the letter of guarantee which are, as seen earlier, couched in words which are clear and unambiguous.

Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it. See also *Tindok Besar Estate Sdn Bhd* v *Tinjar Co*.[5] The respondents did not challenge the validity of the contract on the ground of fraud or want or failure of consideration. What they sought to do was to attempt to establish that when the demand for payment was made to them the appellant had made some fraudulent misrepresentation. In a situation like this the duty of the court is confined to the construction of the written documents and extrinsic evidence is not admissible by virtue of ss 91 and 92 of the Evidence Act.

In our view the chronology of events shows that the defence was an afterthought. It was clearly a sham defence filed solely for the purpose of delaying the judgment. Where the court is satisfied not only that there is no defence to the claim but there is no fairly arguable point to be argued on behalf of a defendant the plaintiff must be granted summary judgment.

In our opinion this was indeed a proper case for summary judgment and accordingly allowed the appeal with costs here and below.

Appeal allowed.

Solicitors: *Mahinder Singh Dulku & Co; Skrine & Co.*

Reported by *Prof Ahmad Ibrahim*

Ng Yiu Kwok and Ors v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) - CRIMINAL APPEAL NOS 13, 14, 15, 16, 17, 18 AND 19 OF 1985
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
7 JULY 1989

Criminal Law - Dangerous drugs -Trafficking in - Abetment - Remarks made by learned trial judge - Whether he should disqualify himself - Investigation carried on by prosecution during the course of the trial - Admissibility of exhibits without makers being called - Makers refusing or unwilling to come to Malaysia to give evidence - Conviction and sentence of accused - Dangerous Drugs Act 1952, s 39B

Criminal Procedure - Dangerous drugs - Trafficking in - Remarks made by learned trial judge - Whether he should disqualify himself - Investigation carried on by prosecution during the course of trial - Admissibility of evidence

Evidence - Admissibility of exhibits without makers being called - Makers refusing or unwilling to come to Malaysia to give evidence - Evidence Act, s 32

This was an appeal against the conviction of and sentence imposed on the first, second, third, fourth and fifth appellants for trafficking in dangerous drugs and the sixth, seventh, eighth and ninth appellants for abetment. The first, second, third, fourth and fifth appellants were detained at the check-in counter of Singapore Airlines at Bayan Lepas International Airport Penang. Each of them had checked in for a flight to Singapore and a connecting flight to Brussels. On examination by the police it was discovered that each of the suitcases found on the appellants had false plastic bottoms and in the secret compartments were packets containing whitish substance which on subsequent examination and analysis by the chemist was shown to be heroin. The chemist found all the search compartments in the suitcases carried by the five appellants were similarly constructed. A false plastic layer was attached to the bottom of each of the suitcases which could be removed and replaced. Later the police also arrested the sixth, seventh, eighth and ninth appellants at the airport. The learned trial judge found the first, second, third, fourth and fifth appellants guilty on the charge of trafficking in dangerous drugs and sentenced each of them to death. He also found the seventh, eighth and ninth appellants guilty of abetment and also sentenced each of them to death. He found the sixth appellant also guilty of abetment but in the circumstances sentenced him to life imprisonment and eight strokes of the rotan. In the appeal it was argued, inter alia, (1) that because of remarks made by the trial judge in open court the learned trial judge should have disqualified himself; (2) that the learned judge erred in holding that the prosecution was not wrong in carrying on with the investigation during the course of the trial; (3) that the learned trial judge should not have accepted the evidence of the chemist because in his grounds of decision he said he had to accept the evidence of the chemist because of lack of cross-examination; (4) the learned trial judge was wrong in admitting exhibits including bills for hotel rooms in Bangkok although the makers of them were not called to give evidence.

Held, allowing the appeal of the sixth defendant and dismissing the other appeals:

(1) The learned judge was correct in not disqualifying himself as he had satisfactorily explained the remarks made by him.

(2) The so-called investigation was in fact for the limited purpose of procuring witnesses to tender certain exhibits in court which exhibits were already in the possession of the prosecution and they had already by then been tendered in court for identification. The court should only be concerned with evidence to see if they are admissible, not when or how such evidence was obtained.

(3) It was correct for the learned judge to accept the evidence of the chemist because it was clear from the notes of proceedings that the chemist was a qualified and experienced chemist and the instructions given to him by the police were clear and his findings were specific.

(4) It appeared quite clear in this case that the documents which were admitted, were made in the course of the business of the hotel. The makers of the documents were outside the jurisdiction and unwilling to come to this country. The documents were produced by a person responsible for their safekeeping. In a situation like this, where the documents were prepared in the course of business and the makers were outside the jurisdiction who refused or were unwilling to come to this country, all the court should need to satisfy the requirement of s 32(b) of the Evidence Act was that there was some evidence to show that the makers' attendance could not be procured without delay or expense which the court considered unreasonable under the circumstances. There was sufficient evidence to that effect in this case.

(5) There was sufficient evidence to justify the learned judge to call for the defence in respect of the first, second, third, fourth and fifth appellants. The presumption in s 37(d) of the Dangerous Drugs Act was properly invoked because the drugs were found in the suitcases in the custody and control of the respective appellants.

(6) As regards the seventh, eighth and ninth appellants there was sufficient evidence of close interactions and positive acts between the first, second, third, fourth and fifth appellants and the seventh, eighth and nine appellants to constitute the offence of abetment required under s 33 of the Dangerous Drugs Act. The learned judge was correct in calling for the defence of the seventh, eighth and ninth appellants at the close of the prosecution's case.

(7) As regards the sixth appellant there was insufficient evidence of abetment at the close of the prosecution's case. He should not therefore have been called for his defence.

(8) The evidence of the appellants did not raise a reasonable doubt on the prosecution's case and their convictions must